



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 26, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant
v.

Complaint No. 2020-162

Hopatcong Police Department (Sussex)
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly redacted a portion of the records responsive to the Complainant’s May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council’s March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s March 29, 2022 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered provide a portion of the requested use of force reports without redactions upon review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties**

cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 26th Day of April 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 26, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-162

v.

**Hopatcong Police Department (Sussex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the name(s) of the specific officer(s) involved in the incidents.³

Custodian of Record: Lt. Michael O'Shea

Request Received by Custodian: May 14, 2020

Response Made by Custodian: August 21, 2020

GRC Complaint Received: August 24, 2020

Background

March 29, 2022 Council Meeting:

At its March 29, 2022 public meeting, the Council considered the March 22, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in Use of Force Reports ("UFRs") may be redacted under Executive Order No. 26 (McGreevy, 2002) and N.J.S.A. 47:1A-1 if they indicate the subjects' mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR's creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions,**

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Robert B. McBriar, Esq. of Schenck, Price, Smith & King, LLP (Sparta, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On March 30, 2022, the Council distributed its Interim Order to all parties. On April 6, 2022, the Custodian e-mailed the Complainant, providing copies of UFRs containing or omitting redactions in accordance with the Order. The Custodian certified that eight (8) of the sixteen (16) UFRs pertained to mental or medical health issues and resulting in criminal charges. The Custodian certified that those UFRs were provided to the Complainant without redactions. That same day, the Custodian also provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its March 29, 2022 meeting, the Council ordered the Custodian to review the redacted UFRs, determine whether any criminal charges were filed in connections with same, and to release those UFRs without redactions. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On March 30, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on April 6, 2022.

On April 6, 2022, the fifth (5th) business day after receipt of the Council's Order, the Custodian responded in writing, providing the Complainant with copies of the requested UFRs. The Custodian asserted that eight (8) of the sixteen (16) UFRs were provided without redactions to conform with the Council's Order. The Custodian also provided certified confirmation of compliance to the Executive Director that same day.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Therefore, the Custodian complied with the Council's March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian improperly redacted a portion of the records responsive to the Complainant's May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct” (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant sought copies of UFRs from the Hopatcong Police Department for a set period, to include the names of the police officers. The Custodian provided responsive records but redacted the names of subjects in the UFRs where the incident pertaining to medical or mental health. The Complainant filed the instant matter, asserting that the subjects' names should not be redacted.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's March 29, 2022 Interim Order, the Custodian was ordered to release without redactions UFRs pertaining to a mental or medical health issue when the incident resulted in criminal charges. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁷

Therefore, pursuant to the Council's March 29, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the Custodian was ordered provide a portion of the requested UFRs without redactions upon review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

⁷ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant's status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep't (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly redacted a portion of the records responsive to the Complainant's May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's March 29, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian was ordered provide a portion of the requested use of force reports without redactions upon review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

April 19, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

March 29, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-162

v.

Hopatcong Police Department (Sussex)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council ("Council") considered the March 22, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in Use of Force Reports ("UFRs") may be redacted under Executive Order No. 26 (McGreevy, 2002) and N.J.S.A. 47:1A-1 if they indicate the subjects' mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR's creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of March 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-162

v.

**Hopatcong Police Department (Sussex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the name(s) of the specific officer(s) involved in the incidents.³

Custodian of Record: Lt. Michael O'Shea

Request Received by Custodian: May 14, 2020

Response Made by Custodian: August 21, 2020

GRC Complaint Received: August 24, 2020

Background⁴

Request and Response:

On May 14, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 21, 2020, the Custodian responded in writing providing sixty-five (65) pages of Use of Force Reports ("UFRs") with redactions. The Custodian stated that the redactions included:

[F]ourteen (14) names of subjects where there was a written indication of mental health of other purported psychological conduct, and/or medical health (i.e. "suicidal", "mental illness", etc.) . . . and one (1) name of a subject connected with a medical disease and related medical information.⁵

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Robert B. McBriar, Esq. of Schenck, Price, Smith & King, LLP (Sparta, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Custodian also redacted the name of a juvenile, but that redaction is not disputed by the Complainant.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Hopatcong Police Department (Sussex), 2020-162 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On August 24, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian was allowed to redact the portions of the UFRs showing medical conditions, juvenile information/names and mental illness. The Complainant contended that it was not proper to redact the names of adults.

The Complainant asserted that the GRC should compel the Custodian to not redact the names of adults, but instead the fields showing medical information or mental illness. The Complainant also requested the GRC award counsel fees.

Statement of Information:

On September 23, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 14, 2020. The Custodian certified that his search included compiling UFRs for the requested timeframe. The Custodian certified that the Hopatcong Police Department (“HPD”) reviewed the documents with the assistance of counsel for information that may be exempt from disclosure. The Custodian certified that he responded in writing on August 21, 2020, providing sixty-five (65) pages of records containing the aforementioned redactions.

The Custodian initially argued that the request at issue was overly broad since it did not reasonably identify any specific government records. The Custodian contended that instead of seeking specific records such as UFRs or arrest records, but rather sought information that may be contained in BPD records showing incidents where police force was used, along with the names of the officers. The Custodian noted that the request did not seek the names of the subjects upon whom use of force was used. The Custodian argued that a requestor may not prevail on a denial of access claim when the basis for denial rests solely upon information that was never requested in the first place.

The Custodian next argued that even if the Complainant explicitly sought the names of the subjects within the UFRs, their names were properly redacted under OPRA. The Custodian asserted that a public agency has a responsibility to “safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy” N.J.S.A. 47:1A-1; Burnett v. Cnty of Bergen v. Cnty of Bergen, 198 N.J. 408 (2009). The Custodian further argued that “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” is exempted from disclosure. See Executive Order No. 26 (McGreevy, 2002) (“EO 26”). The Custodian also noted that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) guarantees privacy rights with respect to individually identifiable health information/protected health information. 45 C.F.R. 164.502(a). The Custodian therefore contended that HPDs limited redactions of the subjects’ names was authorized and supported by law.

The Custodian noted that in Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 1921 (August 8, 2012), the trial judge analyzed the issues surrounding the release of names of individuals identified in UFRs with purported psychiatric or medical conditions. The

Custodian asserted that the court held that, upon applying the privacy balancing test under Burnett, “the names of those subjected to force who were not arrested, that is criminally charged, must be redacted when there is an indication on the UFR of “suicidal,” “emotionally disturbed person,” “EDP,” or any other purported psychological conduct.” However, the Custodian argued that the redactions should apply even if there were criminal charges listed. The Custodian contended that the release of arrestee information under N.J.S.A. 47:1A-3(b) is not absolute and can be eclipsed by existing laws such as N.J.S.A. 47:1A-1 and EO 26.

The Custodian argued that the Complainant has not presented a justifiable need for the names of the subjects contained in the UFRs, given the potential severe and long-term consequences for these subjects if they were to become publicly available. The Custodian argued that the existing stigma surrounding mental illness and suicidality has shown to be a heavy barrier to patients from seeking treatment, and that HPD had a responsibility to protect the names of these individuals under the law.

Lastly, the Custodian argued that there was no knowing and willful violation of OPRA. The Custodian argued that he properly responded within the timeframes permitted by statute along with reasonable extensions. The Custodian asserted that HPD provided the Complainant with responsive records containing the requested information with redactions authorized under the law and public policy.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; *federal regulation*; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 states in part that, “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” are not government records subject to access under OPRA. Furthermore, HIPAA regulations are intended to prevent the disclosure of personal health information except when necessary. See 45 C.F.R. 164.501 and 160.103.

OPRA also provides that, “if an arrest has been made, information as to the defendant’s name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party” must be released “unless the release of such information is contrary to existing law or court rule[.]” N.J.S.A. 47:1A-3(b).

In the current matter, the Custodian provided sixty-five (65) pages of UFRs in response to the Complainant’s OPRA request. The Custodian redacted the names of subjects within the UFRs where the incident pertained to suicide, mental illness, or other medical health situation. The Complainant contended that the names of the subjects should have been disclosed, and that the portions of the UFRs discussing the medical/mental health information should have been redacted instead.

Although unpublished, the GRC finds the Rivera decision persuasive. In that case, the plaintiff sought UFRs without redactions to the names of the subjects upon whom the application of force was used. Rivera, slip op. at 7. The court initially found that while UFRs do not contain a medical diagnosis, they still contained “information relating to the psychiatric or psychological history of the subject of force.” Rivera, slip op. at 19. The court thus held that the names of subjects in UFRs which include an indication of “suicidal,” “emotionally disturbed person,” “EDP,” or similar notation can be redacted under EO 26. Id.

The court also analyzed the issue using the balancing test from Burnett and held that when the subject of the UFR was arrested for the sole purpose of “facilitat[ing] psychological treatment,” they retain their privacy interest under OPRA and their names were lawfully redacted. Rivera, slip op. at 32. The court noted that, “just as the rest of a subject’s psychological history appears to be protected, a subject’s name should also be protected, and the court declines to create a backdoor through which a creative researcher would be able to uncover of a patient’s psychological history by obtaining a UFR under OPRA.” Rivera, slip op. at 31-32. However, the court also held that no privacy interest exists for subjects of UFRs who were charged with a criminal offense, “as biographical information about this class of subjects is already a matter of public record under OPRA.” Rivera, slip op. at 34-36; N.J.S.A. 47:1A-3(b).

Here, the Custodian redacted fourteen (14) names of subjects where there was an indication of the subject’s mental health of other purported psychological conduct, and/or medical health (i.e. “suicidal,” “mental illness”, etc.), and one (1) name connected with a medical disease and related information. However, it is unclear in the record whether these subjects were criminally charged in connection to the incident resulting in the creation of the UFRs.

Accordingly, the Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in UFRs may be redacted under EO 26 and N.J.S.A. 47:1A-1 if they indicate the subjects’ mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR’s creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in Use of Force Reports ("UFRs") may be redacted under Executive Order No. 26 (McGreevy, 2002) and N.J.S.A. 47:1A-1 if they indicate the subjects' mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR's creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Hopatcong Police Department (Sussex), 2020-162 – Findings and Recommendations of the Executive Director

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